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Supreme Court of the United States

October Term, 1975

No. 75-122

LAWRENCE CANTOR d/b/a SELDEN DRUGS COMPANY,
individually and on behalf of all other
retail sellers of light bulbs
similarly situated,

Petitioner,

vs.

THE DETROIT EDISON COMPANY,
a New York Corportion,

Respondent.

On Writ of Certiorari To The United States Court of Appeals
For The Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The National Association of Regulatory Utility Commissioners (NARUC) respectfully moves the Court for leave to file the attached brief *amicus curiae* in the above-entitled cause. In support of such motion, the NARUC shows:

Consent to the filing of a brief in this cause by NARUC was granted by attorneys for repondent Detroit Edison Company. Consent of petitioner Lawrence Cantor has been refused.

The NARUC is a quasi governmental nonprofit organization founded in 1889. Within its membership are the governmental bodies of the fifty States, including the Michigan Public Service Commission, and the governmental agencies of the District of Columbia, Puerto Rico and the Virgin Islands engaged in the regulation of carriers and utilities. The mission of NARUC is to improve the quality and effectiveness of public regulation in America. More specifically, the NARUC contains State officials charged with the duty of regulating privately-owned electric utilities within their respective States to assure the establishment and maintenance of utility services and facilities that may be required by the public convenience and necessity, and to assure the furnishing of service at rates that are just and reasonable.

This case is before the Court on a writ of certiorari to the United States Court of Appeals for the Sixth Circuit. The action was originally instituted in the District Court for the Eastern District of Michigan by Cantor, who sought treble damages and injunctive relief under Federal antitrust laws for the continuation by Detroit Edison of a lamp exchange program which has been, for many years, an integral part of the services provided by Edison under rates approved by the Michigan Public Service Commission (MPSC). The District Court granted Edison's Motion for Summary Judgment on the basis of the State action exemption to Federal antitrust laws pursuant to this Court's decision in *Parker* v. *Brown*, 317 U.S. 341 (1943). On appeal, the District Court's decision was affirmed.

The State governmental regulators who are members of the NARUC have a vital and direct interest in the disposition of this case. The record here shows that the Michigan Public Service Commission approved tariffs filed by Detroit Edison, a regulated electric utility, under which Detroit Edison provides its customers various types of incandescent lamps as a part of basic electric power service. Under Michigan law, such approval

rests upon a determination by the Michigan Commission that the rates and services to be provided thereunder are reasonable, non-discriminatory, and required in the public interest. Hence, this case amounts to a direct attack upon the rates and rate structures of a regulated public utility.

A public utility's rates and services are complex products of the history of past regulatory actions and decisions. Such decisions have historically been entrusted to State regulatory commissions subject, of course, to judicial review.

Petitioner's complaint is apparently based on the theory that if competitive injury has resulted from a State commission determination, then such injured party can simply race to the Federal courts to have the injury corrected on the basis of the Federal antitrust laws. Such a theory plainly threatens the entire structure prescribed by the State of Michigan for regulating the conduct and activities of a public utility.

Nor is the threat posed to State regulatory jurisdiction by petitioner's theory limited to Michigan. The statutory structure through which Michigan has sought to regulate public utilities does not differ substantially from that in effect in other States. Hence, the question presented in this appeal has a significance that extends beyond the interests of the private parties directly involved, and beyond the narrow question of the reasonableness or unreasonableness of the light bulb plan.

It is this threat to the integrity of State regulatory jurisdiction and the process whereby such jurisdiction is exercised which are of prime interest to NARUC in this case. The judicial landmark to be established by the Court in the disposition of this case will have a direct impact on the ability of State authorities to discharge their responsibilities on behalf of the people within their respective jurisdictions. This Court's affirmance of the lower Court's decision is necessary to avoid serious dilution of the State's responsibilities and capacities in the area of public utility regulation.

Wherefore, it is respectfully submitted that this Court should grant leave for the filing of a brief by the National Association of Regulatory Utility Commissioners, as *amicus curiae,* in this case.

Dated this 31st day of December, 1975.

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BRIEF FOR THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS AS *AMICUS CURIAE*

The National Association of Regulatory Utility Commissioners (NARUC) submits, as provided by Rule 42 of the Rules of this Court, the following brief *amicus curiae* in support of the respondent, The Detroit Edison Company.

OPINIONS BELOW

The opinion of the District Court is reported at 392 F. Supp. 1110 (E.D. Mich., 1974). The affirmance of the District Court's decision by the Court of Appeals is reported at 513 F. 2d 630 (6th Cir., 1975). The decisions are included in the Appendix, beginning at 56a and 62a respectively.

QUESTIONS PRESENTED

1. Whether antitrust immunity under the State action exemption applies to a public utility's rates and services which have been approved by a State-designated regulatory authority?

2. Whether the jurisdiction of a State-designated regulatory authority may be defeated and the public interest standard embodied in State law evaded through an action brought against a public utility comprehensively regulated by that authority challenging approved rates and services of that utility under the Federal antitrust laws, even though no such challenge to the rates and services involved have ever been presented to the State regulatory commission itself?

THE INTERESTS OF THE NARUC AS *AMICUS CURIAE*

The interests of the NARUC, as *amicus curiae*, are set forth in the attached Motion for leave to file this brief.

STATEMENT

Since 1886, the respondent, Detroit Edison Company, an electric utility serving Detroit and other areas of Michigan, has provided electric power service under rate schedules that include the cost of providing certain kinds of incandescent

lamps used by its customers (App. 26a).[1] The lamp program was in effect when the State of Michigan enacted a comprehensive statute for the regulation of public utilities, including Detroit Edison, in 1916. Pursuant to that law, Detroit Edison was required to file all of its rates in the form of tariffs with the Michigan Commission, which was given the power to reject, approve or modify the rates thus filed with it. Detroit Edison included the lamp program in its rate schedules filed pursuant to these statutory requirements and, of course, included the cost of this program in the rates themselves. With respect to residential rates, Detroit Edison has followed this practice ever since, and the Michigan Commission has consistently approved these rates.[2] Surveys made in 1955 and again in 1970 on customer usage of the exchange program demonstrated that 94% and 95%, respectively, of Edison's customers used the program (App., 30a).

The statutory framework under which the Michigan Public Service Commission (MPSC) regulates Detroit Edison and other public utilities in that State is substantially similar to that provided by nearly every State in the Union. As set out in the Michigan Compiled Laws (hereinafter "MCL"), §§ 460.4 *et. seq.*, the Michigan Public Service Commission is granted "*complete power and jurisdiction to regulate all public utilities in the state . . .* " (Section 460.6). (Emphasis supplied). This power includes the regulation of "all *rates, fares, fees, charges, services, rules, conditions of service and all other matters*

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1 Detroit Edison's rates are set forth in rate schedules or tariffs filed with the Michigan Public Service Commission. These schedules describe in detail the service to be performed by Detroit Edison and the rates to be charged therefor, including the fact that "incandescent lamps," or light bulbs, will be furnished to users of electric service without "extra charge"—that is, without charge other than the rate set forth in the tariff. (App. 214a).

2 In 1964 Detroit Edison filed a tariff applicable to its commercial rates which substantially modified the light bulb plan for these customers. After investigation, the Michigan Commission approved these modifications (App. 135a, 332a-339a).

pertaining to the formation, operation or direction of such public utilities" and *"all matters pertaining to or necessary or incident to such regulation* of all public utilities, including electric light and power companies . . ." (*Id.*). (Emphasis supplied.) Other statutory provisions specifically authorize the Michigan Public Service Commission to regulate electric utilities, including "the rate of charge" and "the rules and conditions of service" for the transmission and distribution of electricity (Section 460.551).

The pervasive jurisdiction of the Michigan Commission is reinforced by broad remedial and investigatory powers. Section 460.588 requires all electric utilities to "obey and comply with every lawful order made by the commission" under sanction of fine. The statute also provides for the filing of complaints "with reference to the service rendered or any other matter", for investigation and hearings with respect to such complaints, and for the establishment of "such rules and conditions of service as shall be just and reasonable" (Section 460.557).

Orders of the MPSC are appealable to the Ingham County Circuit Court and then to the Michigan Supreme Court (Sections 460.557 and 462.26).

Petitioner herein has never filed a complaint with the MPSC concerning Edison's lamp exchange program, nor has he ever intervened in a rate proceeding to challenge the program.

Petitioner, the owner of a drug store doing business within the geographical area served by Detroit Edison, instituted a class action suit instead in a Federal court under Section 2 of the Sherman Act and Section 3 of the Clayton Act seeking treble damages and injunctive relief on behalf of all similarly situated "business entities . . . engaged in the business of selling light bulbs at retail" in Detroit Edison's marketing area (App. 4a). Specifically, the complaint alleged that Detroit Edison's light bulb program constitutes "an illegal 'tie-in' requirement in restraint of trade and commerce in the sale of standard size and quality incandescent light bulbs" and an "attempt to

monopolize and monoplization" of that market (App. 5a-6a). The complaint does not mention the Michigan Public Service Commission or the fact that the respondent is regulated by that Commission.

On respondent's motion, the District Court granted summary judgment dismissing the complaint. In doing so, the court relied upon the decision of this Court in *Parker* v. *Brown*, 317 U.S. 341 (1943), and appellate court decisions applying *Parker* v. *Brown* in the public utility context. After setting forth the relevant principles from these cases, the court held (App. 59a):

> [I]t appears that the defendant furnished the Commission with data including information on the free bulb exchange program from which the Commission derived a comprehensive schedule of rates and services. Then, after conducting its own investigation and hearings, the Commission ordered specific tariffs, making this plan mandatory for residential subscribers. Defendant cannot discontinue this light bulb program while continuing to charge the approved rate.
>
> It also appears that under M.C.L.A. 460.6 the Commission is given continuing jurisdiction to supervise the 'rates,' 'services' and 'operation' of a utility such as defendant and under M.C.L.A. 460.557 any consumer is given the right to challenge the 'service rendered' in proceedings before the Commission. The court finds, therefore, that the affirmative action of the Commission in approving the rate structure and the continuing supervision of the defendant by the Commission put this case squarely within the *Parker* doctrine.

The District Court also clearly recognized the threat posed to State regulatory schemes by petitioner's approach in this matter when it concluded: "And certainly the court should not step in

when the Commission has not even been approached by plaintiff." App., 60a.

The Court of Appeals for the Sixth Circuit affirmed this decision in a memorandum, stating: "[T]he district court correctly followed the applicable precedents in concluding that the affirmative action of the Michigan Public Service Commission in approving appellee's rate structure that provides for the distribution of light bulbs and its continuing supervision of appellee brings the challenged practice within the doctrine of *Parker* v. *Brown*, 317 U.S. 341 (1943)" (App. 62a).

On October 6, 1975, this Court granted certiorari. 44 U.S. Law Week (October 7, 1975).

SUMMARY OF ARGUMENT

I. The decisions of this Court in *Olsen* v. *Smith*, 195 U.S. 332 (1904) and *Parker* v. *Brown*, 317 U.S. 341 (1943), as well as numerous decisions of the Federal courts of appeals, establish the inapplicability of the Federal antitrust laws to the situation presented in this case. *Olsen* and *Parker* held that the antitrust laws do not apply to anticompetitive activities which are a part of a regulatory program established and controlled by State officials. The *Olsen-Parker* principle plainly applies to conduct such as that involved here growing out of and subject to comprehensive public utility regulation under State law.

Petitioner's contention that Detroit's light bulb program is beyond the jurisdiction of the Michigan Public Service Commission is demonstrably unsound. Under Michigan law, the Michigan Public Service Commission has regulated the light bulb plan for decades and has approved the program as a part of the rates lawfully charged by Detroit Edison. Decisions in other jurisdiction confirm the legality of the Commission's exercise of authority in this area. *Re Customers of Edison Electric Illuminating Company of Boston*, 5 P.U.R. (N.S.) 369, 386 (Mass. Dept. of Publ. Utilities 1934); *Re Wisconsin Gas and Electric Company*, 9 P.U.R. (N.S.) 517, 526 (Wis. Pub.

Serv. Comm'n 1935); *Re Hartford Electric Light Co.*, Docket No. 10047, P.U.R. 3d, Annual 1962, at 306 (Dec. 29, 1961). These commissions have exercised their powers to order light bulb plans abandoned in their States only upon specific findings that due to local conditions, the public interest would not be served by continuation of such plans.

In view of the broad language of the Michigan statute establishing the jurisdiction of the Michigan Commission, and in view of the actions of the Commission in exercising that jurisdiction, the District Court and the Court of Appeals correctly determined that the Michigan Commission properly exercised its authority under Michigan law over the lamp program. In any event, it is well settled that this Court will not itself resolve questions of local law of this nature but will accept the resolution made by district judges and Federal appellate judges more familiar with State law and practice within their jurisdiction. *Richards* v. *United States*, 369 U.S. 1, 16 n.35 (1962); *General Box Co.* v. *United States*, 351 U.S. 701, 707-708 (1956). This case is a particularly appropriate one for application of this principle, since the absence of a definitive ruling on State law results from petitioner's deliberate choice not to challenge the Michigan light bulb plan before the Commission itself.

It is very important to emphasize, we believe, that this case involves rates, and services provided thereunder, approved by a State regulatory authority. The courts of appeals have consistently held that rates charged by public utilities are a classic example of the *Parker* v. *Brown* doctrine. *E.g. Jeffrey* v. *Southwestern Bell Tel. Co.*, 518 F.2d 1129 (1975); *Gas Light Co. of Columbus* v. *Georgia Power Co.*, 440 F.2d 1135 (5th Cir. 1971).

The applicability of *Parker* to the present case is further confirmed by the course of decisions of the courts of appeals. These courts have consistently recognized that under *Parker* the Federal antitrust laws do not apply to regulated conduct of private parties when a State "determines that competition is not

the *summum bonum* in a particular field and deliberately attempts to provide an alternate form of public regulation." *Whitten* v. *Paddock Pool Builders, Inc.*, 424 F. 2d 25, 30 (1st Cir.), *cert. den.*, 400 U.S. 850 (1970). Either on the authority of the *Whitten* case or independently, five other courts of appeals have announced the same, or a substantially identical, understanding of *Parker*. The courts of appeals have also consistently recognized that the pervasive regulation by a State of public utilities is the ultimate, classic example of a State determination that "competition is not the *summum bonum*" in that particular field.

Both petitioner and the United States seek to limit the State action principle of *Parker*, citing, e.g., this Court's recent decisions in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), and *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974). These cases are clearly distinguishable from the one at bar. In *Jackson*, the Court found insufficient State involvement, for purposes of the Fourteenth Amendment, with a utility's termination procedures. In *Goldfarb*, the Court found that the Virginia Supreme Court had not approved minimum fee schedules for attorneys' services.

Finally, this Court should be aware that the essential nature of petitioner's case here is that the *Olsen-Parker* principle must be limited in order to prevent "unncessary intrusion into private, free enterprise" resulting from improvident actions of State authorities (Pet. Br., p. 29). This contention, supported apparently by the Justice Department, amounts to little more than an attempt to reintroduce under the guise of the Sherman Act notions of substantive due process long ago discredited by this Court. In a line of cases beginning with *Nebbia* v. *New York*, 291 U.S. 502 (1934), the Court expressly abandoned the substantive due process philosophy. If *Olsen-Parker* is limited in the manner sought here, the State regulation of businesses within their borders will be thrown back into the state of uncertainty and chaos that existed prior to *Nebbia*.

II. In *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission*, 341 U.S. 329, 336 (1951), this Court referred to the "dual regulation" that exists when Congress enacts laws establishing some Federal regulation of an industry but leaves to the States a substantial responsibility for regulating the same industry. This kind of Federal statute, of which the Federal Power Act is one, reflects a Federal policy supporting the continued existence of comprehensive State regulation of the utility industry. In such a situation, State regulation is protected from frustration through the antitrust laws not only by *Parker* but also by other cases establishing the relationship between Federal regulatory statutes and the antitrust laws.

With respect to Federal regulatory statutes based upon standards inconsistent with the antitrust laws, this Court has expressly recognized the need for antitrust immunity. *Gordon* v. *New York Stock Exchange*, 422 U.S. 659 (1975); *U.S.* v. *National Association of Security Dealers*, 422 U.S. 694 (1975).

The considerations relied upon by this Court in concluding that application of the antitrust laws would be inappropriate in *Gordon* and *NASD* are present to at least the same degree when such liability is sought to be asserted in the face of comprehensive State public utility regulation. Since *Parker* reflects the same common sense need to accommodate State regulation that *Gordon-NASD* rested upon with respect to Federal regulatory agencies, the *Parker* principle should be applied in the same way. In any event, since the continued role of State regulation of electric utilities results from deliberate decisions by Congress to establish a system of "effective dual regulation" rather than to preempt the field, State regulation is protected where, as here, it represents a part of a dual regulation scheme established and maintained by virtue of Congressional policy.

III. Alternative grounds for affirming the lower Court's decision are equitable considerations of comity and abstention. Petitioner here instituted this action in Federal court, thereby

bypassing completely procedures available to him to bring a complaint to the State Commission and to have the Commission's decision reviewed, if desired, by State courts. Interpretations of State law may, arguably, be involved in this case. In addition, although not all the requirements of the Johnson Act may be present here, this case involves rates prescribed by a State commission. Thus, the rationale of the Johnson Act—avoidance of needless friction between Federal district courts and State ratemaking bodies—is applicable here and argues for abstention. An additional reason for abstention here is the fact that the lamp exchange program is predominantly of local interest with little, if any, overriding Federal interest to outweigh the State interests involved. See *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943); *Alabama Public Service Commission* v. *Southern Ry. Co.*, 341 U.S. 341 (1951); *Allegheny Airlines, Inc.* v. *Pennsylvania Public Utility Commission*, 465 F. 2d 237 (3rd Cir. 1972), *cert. den.*, 410 U.S. 943.

ARGUMENT

I.

THE COURT BELOW PROPERLY HELD THAT FEDERAL ANTITRUST LAWS DO NOT APPLY TO RATES AND SERVICES OF A PUBLIC UTILITY PERVASIVELY REGULATED UNDER A STATE STATUTORY SCHEME

This case presents a serious challenge to one of the most firmly established principles in American law. The State of Michigan has enacted a statutory scheme under which public utilities, including electric utilities such as the respondent Detroit Edison, are subjected to comprehensive regulation by the MPSC.

The MPSC's powers are typically broad,[3] the Michigan legislature having delegated to that State agency the power to regulate "all rates, fares, fees, charges, services, rules, conditions of service and all other matters pertaining to the formation, operation or direction of such public utilities." MCL §460.4.

Pursuant to this broad authority, the MPSC has, for decades, continued its approval of Edison's lamp exchange program as an integral feature of the rates to be charged and services to be provided by that utility. Now, however, some 90 years after the exchange program was initiated and some 60 years after the MPSC was created to regulate utilities like Edison, petitioner alleges that the MPSC lacks authority to approve such a service or, in the alternative, that MPSC has never really placed its stamp of approval on the program. Under either theory, the program, it is contended, is not immune as a State action exemption to the Federal antitrust laws under *Parker* v. *Brown*, 317 U.S. 341 (1943).

There is nothing in the laws establishing and defining the powers of the MPSC which suggest that the lamp exchange program was intended to be beyond the regulatory authority of the MPSC. This is important because such programs were widespread in the industry at the time such laws were passed, and remained important features of retail electric service and rates in many areas into the 1930's. Indeed, three of the decisions relied upon by petitioner demonstrate that State regulatory commissions perceived these lamp programs as

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[3] Of course, the very purpose of creating an administrative agency to regulate public utilities is to provide the flexibility and expertise to deal with problems that are too dynamic, complex and specialized to be dealt with by the legislature itself. *Secretary* v. *Central Roig Refining Co.*, 338 U.S. 604, 610 (1950); *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 219-20 (1943). See also I. Barnes, *The Economics of Public Utility Regulation* at 172-173 (1932). Legislative bodies simply are unable to "define the multitudinous details appropriate" and necessary for modern economic regulatory enactments. *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 384 (1947); *NLRB* v. *Gullett Gin Co.*, 340 U.S. 361, 363 (1951); *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 194 (1941).

subject to their broad regulatory authority. These commissions determined, for reasons varying from one locality to another, that the involved utility's lamp program should be terminated. See *Re Customers of Edison Electric Illuminating Company of Amierca,* 5 P.U.R. (N.S.) 369, 386 (Mass. Dep't. of Pub. Utilities 1934); *Re Wisconsin Gas & Electric Co.,* 9 P.U.R. (N.S.) 517, 525 (Wis. Pub. Serv. Comm'n 1935); *Re Hartford Electric Light Co.,* Dkt. No. 10047, P.U.R. 3d, Annual 1962, at 306 (Dec. 29, 1961). Petitioner's reliance on those cases plainly confuses questions concerning the jurisdiction of State regulatory commissions with questions concerning the exercise of discretion pursuant to a basic grant of authority.[4]

The Michigan Commission's exercise of authority over the lamp exchange program is, then, justifiable as being totally consistent with the expectations of the Michigan legislature when the MPSC was created in 1916. There is no Michigan statutory provision or related legislative history which would indicate that the Michigan legislature intended to *withhold* authority from the MPSC to regulate existing or future lamp exchange programs (*Cf. FPC* v. *Louisiana Power & Light Co.*. 406 U.S. 621, 636 (1972)); nor has the Michigan legislature, since 1916, ever seen fit to amend the State laws to restrict MPSC's authority over the program.

Thus, both the contention of the petitioner that this case involves matters outside the jurisdiction of the Michigan Commission and the contention of the United States as *amicus curiae* that the exercise by the Commission of this jurisdiction does not bear the positive approval of the State are sharply contradicted by the longevity of the program and MPSC's involvement therein pursuant to its broad statutory powers.

Beyond that critical fact, however, these contentions can and should be rejected by this Court on the independent ground

[4] Only the Illinois case cited by petitioner, *Consumers Sanitary Coffee & Butter Stores* v. *Illinois Commerce Commission,* 348 Ill. 615, 181 N.E. 411 (1932), in any way suggests a lack of jurisdiction over a lamp program in the State regulatory commission, but the opinion is so cryptical that the actual basis of decision is not clear.

that each of them violates the well-settled principle that the Court will not normally substitute its own views for the decisions of the District Court and the Court of Appeals as to questions of local law and practice with which those courts are more familiar. *Richards* v. *United States,* 369 U.S. 1, 16 n. 35 (1962); *General Box Co.* v. *United States,* 351 U.S. 701, 707-708 (1956); *Griffin* v. *United States,* 336 U.S. 704, 718 (1949); *Busby* v. *Electric Utilities Employees Union,* 323 U.S. 72, 74-75 (1944). Neither the District Court nor the Court of Appeals below had any difficulty in determining that the MPSC's exercise of regulatory authority over the lamp program was consistent with its enabling legislation.

It is also, we believe, extremely important to emphasize that this case involves essentially an attack on rates which have been approved as an "affirmative action of the commisison," as required by Michigan law. MCL §460.552.

The District Court satisfied itself that the Michigan Commission was far from oblivious of the fact that a bulb exchange program was an integral part of the rates approved by it. As the Court noted (App. 59a):

> [I]t appears that the defendant furnished the Commission with data including information on the free bulb exchange program from which the Commission derived a comprehensive schedule of rates and services.

This conclusion by the Court was amply demonstrated in the record below. See, e.g., 1972 "spead sheet" (App. 309a) and decision of the Commission in Case No. U-1791 (App. 332a, 335a-336a).

The fact that the Michigan Commission is sensitive and responsive to the responsibilities placed upon it to regulate the rates and services of electric utilities can hardly be contested. It is worthwhile, we believe, to read several recent opinions by that Commission concerning electric rates in order to gain an

understanding and feeling for both the effort exerted by it, and for the myriad of complex issues that are presented to it, in rate cases. See, e.g., *Re The Detroit Edison Company*, MPSC Case No. U-4257, 3 P.U.R. 4th 209 (1974); *Re Consumers Power Company*, MPSC Case No. U-4332, 3 P.U.R. 4th 321 (1974).

It is within the context of rate cases like *Re The Detroit Edison Company, supra*, and *Re Consumers Power Company, supra*, that the District Court's finding of sufficient State action to warrant a *Parker* v. *Brown* exemption for the lamp service makes eminent sense.

The Fifth Circuit, having the benefit of this Court's reasoning in *Goldfarb* v. *Virginia State Bar Association*, 421 U.S. 773 (1975) (discussed more fully below), recently affirmed a lower court's dismissal of a suit in which plaintiffs had alleged anticompetitive practices on the part of a local telephone utility in the telephone equipment market. The rates that had been approved by the local municipal government pursuant to Texas law were based, among other factors, on the costs related to the provision of the equipment. The Fifth Circuit held that the antitrust attack was barred by the doctrine of *Parker* v. *Brown*, concluding after its analysis:

> Regulation by a governmental body of the rates to be charged by a public utility are a classic example of the *Parker* v. *Brown* exemption.
>
> *Jeffrey* v. *Southwestern Bell Tel. Co.*, 518 F.2d 1129, 1134 (1975).

In *Gas Light Co. of Columbus* v. *Georgia Power Co.*, in which the *Parker* exclusion was held to apply to various rate schedules that had been approved over the years by a State regulatory commission, the Court stated (440 F.2d 1135, 1140 (1971)):

> Our view is that the *Parker* exclusion applies to rates and practices of public utilities enjoying

> monopoly status under state policy when their rates and practices are subjected to meaningful regulation and supervision by the state to the end that they are the result of the considered judgment of the state regulatory authority; . . . .

In supporting the petitioner's position here, the United States, in its *amicus* brief, placed considerable emphasis on this Court's decision in *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1975). The United States concluded that the situation in the instant case "thus apparently parallels that in *Jackson*, where the State regulatory commission carefully scrutinized the rate portions of the tariff but did not specifically consider the provision that was challenged under the Civil Rights Act (419 U.S. at 354-355)." U.S. Br., 11.

It is, of course, one thing to suggest that the *Jackson* case runs "parallel" to the instant case and another to suggest, as the United States does, that the issues and facts underlying the *Jackson* decision compel a similar decision here of a lack of State action. The two cases are significantly disparate and warrant different determinations on the State action issue.

Jackson involved the question of whether the Pennsylvania Public Utility Commission was "sufficiently connected" with an electric utility's procedures for termination of service so as to make the utility's "conduct in so doing attributable to the State for purposes of the Fourteenth Amendment. *Id.*, 419 U.S. 359. The Court held that the nexus was insufficient *for purposes of the Fourteenth Amendment under the facts of that case.*

To determine whether a sufficient nexus has been formed for the State action doctrine to be applied under *Parker* v. *Brown* requires, in the first place, quite different considerations than those analyzed by the Court in *Jackson*. As the Court of Appeals for the Seventh Circuit, sitting *en banc*, pointed out in *Lucas* v. *Wisconsin Electric Power Co.*, 466 F. 2d 638, 654 n. 35 (7th Cir. 1972), *cert. den.*, 409 U.S. 1114 (1973):

> Compliance with state economic regulations may *provide a private company with a defense to a* Sherman Act prosecution, see, *e.g.*, Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315, but the inapplicability of that federal statute to certain conduct does not imply that an entirely different federal statute does apply. We do not view the Civil Rights Act of 1871 as either a species of or a substitute for, anti-monopoly legislation.

In *Jackson*, this Court also found that there had been a total lack of scrutiny, of many years' duration, by the State Commission of the utility's termination procedures. 419 U.S. 354-5. Given the record in this proceeding and the fact that the lamp exchange program had been for decades an integral and conspicuous part of the service provided by Detroit Edison under approved rate schedules, it can hardly be suggested that the MPSC was oblivious to the existence of the program and its impact on rates charged and services provided thereunder. [5]

This Court in *Jackson* also seriously questioned whether the Pennsylvania PUC regulation *required* any filing on the part of the electric company respondent of termination procedures as a part of its tariff and whether the Commission had power to disapprove the procedures (419 U.S. 355). The Court further concluded that, "[a]t most, . . .[the] Pennsylvania utility was authorized to employ such a practice if it so desired." 419 U.S. 357.

The circumstances in this case are entirely different. Here, the costs of the lamp exchange program are specifically included in the rates approved by the MPSC. Such rates cannot go into effect without the "affirmative action" of the Michigan Commission. Once the rates are approved, predicated partly on the basis of the costs of the lamp exchange program and the

[5] In this regard, it is important to point out that petitioner here is not really complaining about the way the lamp exchange program has been implemented. He is clearly challenging the right of the MPSC to approve *any* lamp exchange program, irrespective of the extent of scrutiny by the MPSC of the detailed implementation of the program.

services to be provided, Detroit Edison has no choice but to provide the service. The sovereign command to act is clear here as the District Court concluded by observing: "Defendant cannot discontinue this light bulb program while continuing to charge the approved rate." App., 59a. The existence here of a clear command by the State to act distinguishes this case from *Jackson*, *Goldfarb* v. *Virginia State Bar Association*, *supra*, and from cases like *United States* v. *Pacific Southwest Airlines*, 358 F. Supp. 1224 (C.D. Cal., 1973), *cert. dis.*, 414 U.S. 801 (State regulatory commission authorized a proposed merger, but did not require the consummation of the proposal).

The decision by this Court in *Goldfarb* v. *Virginia State Bar Association*, *supra*, is heavily relied upon by the petitioner (Pet. Br., 15-16), but we believe such reliance is misplaced.

Goldfarb involved the issue of whether minimum fee schedules published by the Fairfax County Bar Association and enforced by the Virginia State Bar violated Federal antitrust laws by fostering prohibited anticompetitive practices for the benefit of their members. This Court found that such practices by the Bars were not immune from the Federal antitrust laws under *Parker* "because it cannot fairly be said that the State of Virginia through *its Supreme Court rules* required the anticompetitive activities of either respondent." 421 U.S. 790. (Emphasis supplied). The Court found that the Virginia Supreme Court was authorized by State law to regulate the practice of law, that the Virginia Court "far from exercising state power to authorize binding price-fixing, explicity directed lawyers not 'to be controlled' by fee schedules," (421 U.S. 789), and that there was "no indication in this record that the Virginia Supreme Court approves the [ethical] opinions [of the State Bar]". 421 U.S. 791.

As discussed above, the record here clearly demonstrates that the MPSC was aware of, and approved, the lamp exchange program as an integral feature of rates to be charged and the services to be provided by Edison. The District Court found

such active approval on the part of the MPSC to have been sufficiently demonstrated. App., 59a.

Clearly, what is involved here are the rates charged and services provided by a company that undoubtedly falls under the classification of a "heavily regulated utility with at least something of a governmentally protected monopoly [whose acts] will more readily be found to be State 'acts' than will be the acts of an entity lacking these characteristics." *Jackson, supra,* at 419 U.S. 351.

A State determination to replace competition with a pervasive scheme of economic regulation over an industry must be given considerable, separate weight in any evaluation of whether a particular activity of a company heavily regulated under that scheme should be held immune from antitrust attack.

More than seventy years ago, shortly after the passage of the Sherman Act, this Court rejected the contention that a law of the State of Texas regulating pilots in the port of Galveston should be held invalid because it excluded otherwise competent pilots from rendering such services in competition with those licensed by the State. *Olsen* v. *Smith,* 195 U.S. 332 (1904). The State law involved in *Olsen* had been attacked both under the Due Process Clause of the Fourteenth Amendment and under the Sherman Act. The Court peremptorily rejected the due process claim, saying (195 U.S. at 344):

> . . . this proposition in its essence simply denies that pilotage is subject to governmental control. . . .

The Court then rejected the Sherman Act claim, pointing out that a claim under that Act did not differ in any substantial respect from a claim under the Due Process Clause when applied to activities made subject to state regulation (195 U.S. at 345):

> The contention that . . . the commissioned pilots have a monopoly of the business, and by a combination among themselves exclude all others

> from rendering pilotage services, is also but a denial of the authority of the state to regulate. . . .

This Court has never departed from the almost contemporaneous construction of the Sherman Act set forth in *Olsen*—a construction that reflected the Court's explicit recognition that any other view would transform the Sherman Act into "a denial of the authority of the state to regulate." Thus, in *Parker* v. *Brown,* where a suit was brought to enjoin State officials from enforcing an agricultural proration and marketing program regulating the handling, disposition and prices of raisins in California, the Court held that the antitrust laws were not intended to prevent the States from establishing such programs and, on that basis, rejected the contention that the implementation of the program violated the antitrust laws.

The decisions in *Olsen* v. *Smith* and *Parker* v. *Brown* have long been recognized as establishing the broad principle that where a State chooses to displace competition with a comprehensive regulatory statute reflecting different policies, the antitrust laws do not apply to conduct growing out of and subject to such regulation. Thus, in relying upon *Parker* v. *Brown,* The Courts below in this case cited and relied upon decisions of the Federal courts of appeals which recognized precisely that broad principle. Indeed, that has been virtually the uniform understanding of *Parker* v. *Brown* among the Federal courts of appeals.

A leading case setting forth this understanding of *Parker* v. *Brown* is *Whitten* v. *Paddock Pool Builders, Inc.,* 424 F.2d 25 (1st Cir.), *cert. den.,* 400 U.S. 850 (1970), in which the First Circuit stated (424 F.2d at 30):

> Our reading of *Parker* convinces us that valid government action confers antitrust immunity . . . when government determines that competition is not the *summum bonum* in a particular field and

deliberately attempts to provide an alternate form of public regulation.[6]

The pervasive regulation by a State of public utilities is, of course, the ultimate, classic example of a State determination that "competition is not the *summum bonum*" in that particular field. This too has explicitly been recognized by the courts of appeals. In *Washington Gas Light Co.* v. *Virginia Electric & Power Co.*, 438 F. 2d 243 (4th Cir. 1971), for example, the Court of Appeals for the Fourth Circuit expressly rejected an effort to impose antitrust liability upon a regulated electric power company because of the inconsistency between the antritrust standard of competition and State regulation based upon a public interest standard (438 F.2d at 254):

> We suggest that the rationale and underlying purpose of both the Sherman and Clayton Acts is to prevent monopoly *where it is not in the public interest*. It has long since been established that both gas and electricity can best be produced and distributed (and the public benefited) by monopoly under state regulation. The problem here is not one of preventing monopoly . . . but of making lawful monopoly work best in the public interest. Doubtless, we think, SCC can do a better job than private piecemeal application of laws aimed against monopoly. (Emphasis supplied.)

[6] In *Hecht* v. *Pro-Football, Inc.*, 444 F. 2d 931, 941 (D.C. Cir. 1971), the Court of Appeals for the District of Columbia quoted this portion of the *Whitten* opinion as its understanding of the *Parker* v. *Brown* principle, as did the Court of Appeals for the Ninth Circuit in *New Mexico* v. *American Petrofina, Inc.*, 501 F. 2d 363, 368-369 (9th Cir. 1974). And in *Ladue Local Lines, Inc.*, v. *Bi-State Development Agency of the Missouri-Illinois Metropolitan District*, 433 F. 2d 131 (8th Cir. 1970), the Eighth Circuit stated the same understanding of *Parker* v. *Brown* in only slight different language (433 F. 2d at 137). The formulation of the *Parker* v. *Brown* principle by the Eighth Circuit in *Ladue Local Lines* paraphrased the earlier interpretaiton of the Fourth Circuit in *Asheville Tobacco Board of Trade Inc.* v. *FTC*, 263 F. 2d 502, 509 (4th Cir. 1959). This is also the formulation that was accepted by the Court of Appeals for the Third Circuit in *Norman's on the Waterfront, Inc.* v. *Wheatley*, 444 F. 2d 1011, 1017 (3d Cir. 1971).

The Court of Appeals for the Fifth Circuit reached the same result with respect to the regulated electric power company involved in *Gas Light Co. of Columbus* v. *Georgia Power Co., supra.*

The same result has been reached in the Fourth, Fifth and Sixth Circuits with respect to telephone companies pervasively regulated under State law. Thus, in *Business Aides, Inc.*, v. *Chesapeake and Potomac Tel. Co. of Va.*, 480 F. 2d 754 (4th Cir. 1973), the Fourth Circuit quoted that portion of the Fifth Circuit's holding in the *Gas Light Co. of Columbus* case set out above in rejecting an effort to impose antitrust liability upon a pervasively regulated telephone utility and added (480 F. 2d at 756):

> If its [defendant's] actions were occasioned by adherence to the rules and regulations of its operative tariff, then it is shielded from liability for any possible antitrust violations.

In *Lamb Enterprises, Inc.* v. *Toledo Blade Company*, 461 F. 2d 506 (6th Cir. 1972), the Sixth Circuit reached the same result on virtually identical reasoning (461 F. 2d at 513):

> A public utility may not be held for an anti-trust violation when it has complied with its tariff.

And in the most recent case dealing with this question, the Fifth Circuit reached an identical result. *Jeffrey* v. *Southwestern Bell Tel. Co., supra.*[7]

[7] The same conclusion was reached in a thoroughly researched and well reasoned article exploring the rationale and scope of *Parker* v. *Brown*. See Paul R. Verkuil, "State Action, Due Process and Antitrust: Reflections on *Parker* v. *Brown*," 75 Columbia L. Rev. 328, 353 (1975), where the author concludes that the rationale for applying *Parker* v. *Brown* to public utilities, as set forth in *Washington Gas Light, supra*, "is firmly rooted in the public utility/public calling context."

There is, thus, considerable agreement that antitrust suits against public utilities based on activities growing out of and subject to State regulation are precluded by the principle in *Olsen* and *Parker*.[8] When suits such as the instant one are essentially attacks against rates and related services approved by State regulatory commissions, they are "classic examples" for the application of the *Parker* exemption.

Finally, a word about the more frightening aspects of this case for State regulation of business in general.

Petitioner's basic position here, which is apparently supported by the United States as *amicus curiae*, is that the *Olsen-Parker* principle must be limited in order to prevent "unnecessary intrustion into private, free enterprise" resulting from improvident actions by State regulatory authorities (Pet. Brief, p. 29). This contention lays bare the essential nature of this case, which, from a legal standpoint, amounts to little more than an attempt to reintroduce under the guise of the Sherman Act notions of substantive due process long ago abandoned by this Court as a justification for denying to the States the power to regulate certain businesses in the public interest.

The power of the States to displace a scheme of free and open competition with a scheme of regulation in which competition is only one of many factors to be taken into account in the public interest was first established in *Munn* v. *Illinois*, 94 U.S. 113 (1877). With the vindication of the State's power to regulate certain businesses in the public interest, a substantial number of States enacted regulatory statutes even before the passage of the Sherman Act in 1890—a trend which continued unabated

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[8] The Ninth Circuit, in *Industrial Communications Systems, Inc.* v. *Pacific Tel & Tel. Co.*, 505 F. 2d 152 (1974), chose, however, to refer the antitrust case to the California Public Utilities Commission under the doctrine of primary jurisdiction. The Court pointed out that ultimate adjudication of the case would depend on "whether the scope and nature of the regulatory control exercised in the particular case precludes application of the antitrust laws." 505 F. 2d 157. See, also, *Carter* v. *American Tel. & Tel. Co.*, 365 F. 2d 486, 493-7 (5th Cir., 1966), *cert. den.*, 385 U.S. 1008.

following its passage. However, efforts to frustrate and destroy such State regulation continued. During the 1920's and the early 1930's, this Court repeatedly struck down State regulation on the ground that such regulation violated the Due Process Clause of the United States Constitution. *Adkins* v. *Children's Hospital*, 261 U.S. 525 (1923); *Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U.S. 522 (1923); *New State Ice Co.* v. *Liebmann*, 285 U.S. 262 (1932). However, in a line of cases beginning with *Nebbia* v. *New York*, 291 U.S. 502 (1934), the Court expressly abandoned the substantive due process philosophy, expressly overruled a number of its prior decisions and once again reaffirmed the regulatory power of the States. *Parker* v. *Brown* represented the culmination of this process in that the Court there refused to permit the reintroduction of substantive due process notions under the guise of the Sherman Act.

The complaint in this case raises anew the very questions that were resolved in *Nebbia*. If *Olson-Parker* is limited in the manner sought here, the power of the States to regulate businesses within their borders will be thrown back into the very state of uncertainty and chaos that existed prior to *Nebbia*. Hence, although the specific controversy that gives rise to this case seems relatively unimportant, the Court should be mindful of Justice Brandeis' dissent in *New State Ice*, where he pointed out that "the business of supplying to others, for compensation, any article or service whatsoever may become a matter of public concern," and "[i]f it is a matter of public concern, it may be regulated, whatever the business" (285 U.S. at 301). The rate structure of electric utilities and the conditions of electric power service are unquestionably matters of public concern in Michigan and this Court should not therefore permit interference with its regulation.

The principle of *Parker* v. *Brown* is vital to effective State regulation and should not be eroded, particularly on the basis of the sort of gross speculation and wholly imaginary dangers sought to be relied upon here. Certainly, petitioner's contention that a full application of the principle of *Olsen-Parker* to public

utilities would subject the national economy to serious dangers from State commissions is unsound. The short answer to that contention is that, as this Court pointed out in *Parker* v. *Brown*, the Federal antitrust laws were aimed at private conduct and were never intended to protect the economy against the regulatory policies of State commissions or the State legislatures which establish them.

This Court should not treat the Sherman Act as though it has quasi-constitutional status which justifies invalidating State regulatory statutes simply because they do not comport with the Antitrust Division's economic theories. Such a view would turn this Court into a "superlegislature to weigh the wisdom of legislation." *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U.S. 421, 423 (1952). As the Court said in *Ferguson* v. *Skrupa*, 372 U.S. 726, 732 (1963):

> The . . . statute may be wise or unwise. But relief, if any be needed, lies not with us but with the body constituted to pass laws . . . .

II

THE DUALITY OF STATE AND FEDERAL REGULATION OF ELECTRIC UTILITIES CONSTITUTES AN INDEPENDENT GROUND PRECLUDING APPLICATION OF THE FEDERAL ANTITRUST LAWS TO MATTERS SUBJECT TO STATE REGULATORY JURISDICTION

In *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission*, 341 U.S. 329, 337 (1951), this Court referred to the "effective dual regulation" that results from Federal statutes regulating certain aspects of public utility industries but leaving substantial aspects of those industries to regulation by the States. The *Panhandle Eastern* case had specific reference to the dual regulation established by the Natural Gas Act (15 U.S.C. § 717), which expressly exempts

"the local distribution of natural gas [and] the facilities used for such distribution" and other "matters primarily of local concern and subject to regulation by the several states" from the Federal act and leaves those matters within the regulatory jurisdiction of the States. The Federal Power Act establishes this same kind of dual State and Federal regulation. Indeed, the Federal Power Act goes even further than the Natural Gas Act and recognizes the continuing role of State regulation of electric utilities through a provision that "Federal regulation . . . [is] to extend only to those matters which are not subject to regulation by the States" (16 U.S.C. §824(a)). [9]

The Court in *Parker* held that State-regulated anticompetitive practices were exempt from attack under the Federal antitrust laws because the "Sherman Act did not undertake to prohibit" State action (317 U.S. 352) and noted: "In a dual system of government in which, under the Constitution, the states are sovereign, . . . an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." 317 U.S. 351.

The Court in *Parker* further found that the State regulation of the marketing and pricing of California raisins was harmonious with the Federal regulatory scheme contained in the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246). 317 U.S. 352-359. As the Court of Appeals for the District of Columbia has noted (*Hecht* v. *Pro-Football, Inc.*, 444 F.2d at 937):

> Thus, Parker v. Brown involves not just state governmental action; it involves regulatory action in the state's capacity as sovereign, and it involves

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[9] The Communications Act of 1934 also contains several similar provisions barring the exercise of jurisdiction by the Federal Communications Commission over intrastate communications (47 U.S.C., §152(b)(1)), and even over some interstate communications "where such matters are subject to regulation by a State commisison or by local governmental authority" (47 U.S.C., §221(b)).

> sovereign state regulatory action which is consistent with federal national policy, *i.e.*, the Agricultural Adjustment Act, enunciated by the national Congress, which is also the source of federal antitrust policy.

In view of the explicit Congressional recognition of State regulatory power over electric utilities, the State action that is involved in this case is protected not only by the State action principle in *Olsen* v. *Smith* and *Parker* v. *Brown*, but also by the plain Congressional purpose evident in the Federal Power Act that the traditional scope of the efficacy of State regulation of electric power utilities remain undiminished.

The issue of reconciling the antitrust laws with other Federal regulatory schemes was presented to this Court in two cases decided last June (*Gordon* v. *New York Stock Exchange*, 422 U.S. 659 (1975) and *United States* v. *National Association of Security Dealers*, 422 U.S. 694 (1975)).

In *Gordon*, the Court had before it the task of reconciling the antitrust laws with the regulatory scheme governing the practices of the securities exchange and their members, an industry (unlike electric utilities) not traditionally regarded as a public utility. This Court held that application of the antitrust laws to the regulated exchanges, and in particular to their practice of approving fixed commission rates, "would render nugatory the legislative provision for regulatory agency supervision of exchange commission rates" (422 U.S. 691). In the course of so holding, the Court stated that the reason for this conclusion was the fundamental inconsistency between the requirements and standards the SEC must follow in approving rates and the competition standard of the Sherman Act (422 U.S. 689-90).

> If antitrust courts were to impose *different standards or requirements*, the exchanges might find themselves unable to proceed without violation of the mandate of the courts or of the

> SEC. Such *different standards are likely to result* because the sole aim of antitrust legislation is to protect competition, whereas the SEC must consider, in addition, the economic health of the investors, the exchanges, and the securities industry . . . . *[P]ermitting courts throughout the country to conduct their own antitrust proceedings would conflict with the regulatory scheme* authorized by Congress rather than supplement that scheme. (Emphasis supplied.)

Similarly, in *United States* v. *National Association of Securities Dealers*, *supra*, this Court upheld the dismissal of an antitrust attack upon certain sales and distribution practices employed in the marketing of mutual fund shares which were subject to regulation by the SEC. The Court held that "the Sherman Act has been displaced by the pervasive regulatory scheme established by the Maloney and Investment Company Acts" and stated (422 U.S. at 734-5):

> . . . we have implied immunity in particular and discrete instances to assure that the federal agency entrusted with regulation in the public interest could carry out that responsibility free from the disruption of conflicting judgments that might be voiced by courts exercising jurisdiction under the antitrust laws. See *Hughes Tool Co.* v. *Trans World Airlines*, 400 U.S. 303 (1973); *Pan American World Airways, Inc.* v. *United States*, 372 U.S. 206 (1963). In this instance, maintenance of an antitrust action for activities so directly related to the SEC's responsibilities poses a substantial danger that appellees would be subjected to duplicative and inconsistent stand-

ards. This is hardly a result that Congress would have mandated.[10]

The standards developed in *Gordon* and *NASD* for implying the inapplicability of Federal antitrust laws to regulatory schemes entrusted to Federal agencies are equally pertinent to the questions presented here. The dilemma of a regulated company faced with "duplicative and inconsistent standards" under State public utility regulation and the antitrust laws is equally real. Similarly, the situation of a regulatory agency seeking to enforce a public interest standard in the face of Federal court intervention to enforce a pure competition standard is precisely the same, whether that agency be State or Federal if the reasoning of *Gordon* and *NASD* is sound—and we believe it to be eminently sound—that reasoning applies with full force to State regulation of public utilities.

Indeed, despite the entrance of the United States in this case as *amicus* to argue that the Michigan Commission's "indirect authorization" of the lamp exchange program was insufficient State action to have *Parker* apply, the United States has previously recognized that a pervasive scheme for public utility regulation represents an *a fortiori* situation for implied immunity to the antitrust laws.

In its *amicus* brief in *Gordon*, the United States stressed that public utility-like regulation was *not* involved (U.S. Brief in *Gordon* v. *New York Stock Exchange*, p. 35):

> The language, structure and history of the Act, as set forth above, show that Congress did not

[10] Prior to this Court's decision in *Gordon* and *NASD*, the leading case in this area was *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963). There the Court upheld dismissal of the Sherman Act complaint challenging matters subject to comprehensive regulation by the CAB because concurrent jurisdiction would subject air carriers to inconsistent standards and potentially conflicting judgments (371 U.S. at 309-10). This Court applied precisely the same rationale in *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363 (1973).

> intend to substitute a comprehensive, public utility-like system of government regulation for the regime of competition fundamental to private enterprise in other sectors of the economy.

It then relied upon this fact as the very basis for its argument that the antitrust laws could be applied in *Gordon* (*Id.*, at 36):

> *Because* the scheme of regulation is thus limited, and *because* members of the exchanges enjoy the same private initiative as other commercial enterprises, they are subject to the national policy of competition. (Emphasis supplied.)[11]

Hence, in *Gordon*, the United States essentially recognized, at least with respect to Federal regulation, the very principle which it opposes here with respect to State regulation.

We believe, then, that the same standards announced and applied in *Gordon* and *NASD* where Federal regulation is involved should be equally applicable under *Olsen* v. *Smith* and *Parker* v. *Brown* where State regulation is involved.[12]

[11] The Court itself recognized this essential nature of the United States' argument in *Gordon* (422 U.S. 688):

> The United States appears to suggest that only if there is a pervasive regulatory scheme, as in the public utility area, can it be concluded that the regulatory scheme ousts the antitrust laws. Brief for the United States 16, 35.

[12] Application of *Gordon* and *NASD* standards to State and Federal regulation would not necessarily mean that the interstate and intrastate aspects of the same industry would be identical. In many instances, there are major differences between the degree and kind of regulation to which the interstate aspects of an industry are subjected under Federal law and the regulation of that industry under State law. Hence, the fact that the Court in *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973), found, in a four to three decision, that "Congress rejected a pervasive regulatory scheme for controlling the *interstate* distribution of power in favor of voluntary commercial relationships" (410 U.S. at 374) (emphasis

III.

ALTERNATIVE GROUNDS FOR AFFIRMING THE LOWER COURT'S DECISION ARE EQUITABLE CONSIDERATIONS OF COMITY AND ABSTENTION

The Courts below were obviously concerned with the propriety of petitioner initiating this action in a Federal court to contest rate determinations of a State regulatory agency, thereby bypassing completely the remedies available to him under State law to contest such decisions both before the Commission and the State courts. Although the lower Courts did not expand on this point, the District Court's concern was clearly stated in the last sentence of its Opinion where it observed: "And certainly the court should not step in when the Commission has not even been approached by plaintiff." App. 60a.

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supplied), and, therefore, that "the limited authority of the Federal Power Commission" (*Id.*) did not immunize the challenged conduct of Otter Tail from the antitrust laws, in no way indicates either that State regulation of the local retail distribution of electric power is not comprehensive or that such regulation does not provide a basis for antitrust immunity.

Moreover, both the Federal Power Act and the Public Utility Holding Company Act recognize not only that the States have exclusive jurisdiction to regulate the local distribution of electric power, but also that the States may approve actions of public utilities which reduce or eliminate competition when such action, in the opinion of the State public utility commission, will serve the public convenience and necessity of the State. For example, the Public Utility Holding Company Act's prohibition on the common ownership of electric and gas utilities serving the same territory is expressly limited to exempt such common ownership approved by the State commission (15 U.S.C. §79h). Similarly, the Act explicitly recognizes the power of the State commissions to permit public utilities to acquire the securities or assets of other utilities (15 U.S.C. §791(b)). The Federal Power Act and the Public Utility Holding Company Act are thus premised on the recognition that the electric power industry is composed at the retail level of local distribution monopolies regulated by the States through their public utility commissions in accordance with the public policy of the State.

It is well established that a Federal court should abstain from exercising its jurisdiction in order to avoid unnecessary conflict with the administration by a State of its own affairs. *Alabama Public Service Commission* v. *Southern Ry. Co.*, 341 U.S. 341 (1951); *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943).

Burford v. *Sun Oil Co., supra,* involved an attack on the validity of proration orders in Texas oil fields on the ground, among others, that the orders denied to Sun Oil due process of law. The Court found that the exercise of the district court's jurisdiction would have interfered with a unified and comprehensive State scheme for regulating a complex industry. The Court stated (319 U.S. 333-4):

> The State provides a unified method for the formation of policy and determination of cases by the Commission and by the state courts. The judicial review of the Commission's decisions in the state courts is expeditious and adequate. Conflicts in the interpretation of state law, dangerous to the success of state policies, are almost certain to result from the intervention of the lower federal courts. On the other hand, if the state procedure is followed from the Commission to the State Supreme Court, ultimate review of the federal questions is fully preserved here. Cf. Matthews v. Rodgers, 284 US 521, 76 L ed 447, 52 S Ct 217. Under such circumstances, a sound respect for the independence of state action requires the federal equity court to stay its hand.

In *Alabama Public Service Commission* v. *Southern Ry. Co., supra,* the Supreme Court determined that the Johnson Act (28 U.S.C., §1342) was inapplicable since the Commission order that was challenged did not concern rates. The involved order related to a request to discontinue passenger train service. This Court decided that the District Court should have declined to exercise its jurisdiction in order to avoid "needless friction with

state policies." The railroad, the Court held, should have pursued its rights through the State courts. 341 U.S. 350.

Although all four requirements of the Johnson Act may not be met in this case, the fundamental rationale for that Act—avoiding disruption of State ratemaking procedures by Federal district courts—is applicable here. Petitioner here is, in effect, requesting a Federal injunction against the enforcement of rates approved by the MPSC without first having exhausted State remedies available to him, both before the Commission and the State courts.

In addition, part of petitioner's suit is based on the allegation that the MPSC has exceeded its State-delegated authority by including the lamp exchange program in the services provided pursuant to approved rates. This point concerning the scope of MPSC's authority has, arguably, not definitely been decided by the Michigan courts, thereby bringing the Court's rationale in *Burford* v. *Sun Oil Co., supra,* for Federal abstention into play. See, also, *Lake Carriers' Assoc.* v. *MacMullen,* 406 U.S. 498, 510-511 (1972).

In the recent case of *Allegheny Airlines, Inc.* v. *Pennsylvania Public Utility Commission,* 465 F. 2d 237 (3rd Cir. 1972), *cert. den.,* 410 U.S. 943, the Court of Appeals for the Third Circuit held that equitable abstention was proper even though the issue in the case was whether the airline must submit to the jurisdiction of the Pennsylvania Commission prior to terminating intrastate passenger service between certain cities. The airline was challenging the jurisdiction of the Pennsylvania Commission and claimed that the Federal Aviation Act preempted the authority of the State in this area.

The Court in *Allegheny Airlines,* in affirming the applicability of the abstention doctrine to the facts in that case, mentioned several factors which prompted its conclusion: 1) The State concerns were significant; 2) No evidence was presented that the plaintiff would have been harmed if it had resorted to the State commission and State courts; 3) The

reliance by local communities on the services that had originally been authorized by the State commission; 4) The lack of any other overriding Federal concerns that would outweigh the above factors. 465 F.2d at 244-245. We submit that all those factors are equally applicable here.

For the reasons given above, the lower Court's decision should be affirmed on the alternative grounds of comity and abstention.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Sixth Circuit should be affirmed.

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